taken from the cash on hand and set aside as a reserve fund, and the remainder of the net profits of the exchange for the period specified will be disposed of by distribution to the organizations comprising the exchange and to various funds.

5. Subdivision (b) of paragraph 10 of section 11 reads as follows:

> "When an exchange is first established, the exchange council will fix the amount necessary for its establishment. When this amount has been determined, it will be divided by a number equal to the number of shares, the result being the value of one share. The amount to be paid by or to be charged to any company or detachment for its entrance fee or capital stock will be determined by multiplying the value of one share by a number equal to the authorized enlisted strength for the post, camp, or station of the company or detachment seeking admission."

From the foregoing it is clearly apparent that an exchange is in the nature of a private enterprise operated along the lines of an association or a corporation in which the members own certain rights represented by shares. It is also obvious that the government advances no funds and is in no way financially responsible.

6. Paragraph 48 of section VII (p. 32) reads as follows:

> "The expense of fitting up the quarters of an exchange and procuring the necessary articles

for the first stock and fixtures will be met by assessment from the funds of the several organizations which make up the membership of the exchange, or those will be contracted for, or procured on credit. When procured on credit, the bills will be paid from the first profits. *The post exchange is responsible for the debt, and not the Government.* This will be made perfectly clear to those extending credit."

The Government of the United States is responsible for the debts of its departments such as the War Department, but it will be noted that the War Department regulations specifically provide that the Post Exchange and not the Government is responsible for the debts of the exchange, and it is required that this fact shall be made perfectly clear to anyone extending credit to the exchange.

Paragraph 50 of section VII (p. 35) reads in part as follows:

"Post exchanges being *agencies of the Government*, the duties imposed upon officers in the management of exchange affairs are as binding upon them as any other duty to which they may be assigned under competent military authority and when the property or funds of an exchange are lost through mismanagement or neglect of the exchange officer or any members of the exchange council, or both, the least that can or should be exacted in the public interests is that the exchange officer, and any members of the exchange council, responsible therefor, should make good the loss."

See Dig. Ops. J. A. G., 1912-1917, p. 474.

Attention is directed to the fact that in the above quoted paragraph Post Exchanges are designated as "agencies of the Government" which, as must be conceded, in effect denies that Post Exchanges are departments of the Government.

Nowhere in the regulations is there any intimation that supplies sold at a Post Exchange are for the official use of the Government, but it is apparent from the regulations that the contrary is true, namely, that such supplies are sold to those entitled to buy them for their individual and private use and consumption.

8. Paragraph 72 of section IX (p. 38) reads in part as follows:

> "Funds of a post exchange, *although not public moneys within the meaning of Sections 3488, 3490, and 3492 of the Revised Statutes, are intrusted to officers of the Army in their official capacity, and their misapplication is punishable under the Articles of War.* When practicable, such part of them as is not required for immediate use should be deposited in a bank. For an officer in charge of a post exchange to lend its money to anyone would be a gross breach of trust."

In page 39 of the Regulations, subdivision (c), paragraph 72, section IX, it is stated that an exchange officer who cashes checks out of the exchange funds assumes the risk of loss and that the *Government is not interested in any proceedings to*

recover the money or to prosecute the drawer of the checks. Citing Dig. Ops. J. A. G., May 17, 1919.

In subdivision (d) of this paragraph it is stated that in case of loss the exchange may assert its claim against the exchange officer through whose error the loss arose, but that *no claim can be enforced against the Government.* Citing Ops. J. A. G., Oct. 4, 1919.

Revised Statutes, section 5490 above referred to (Criminal Code, section 87) relates to the unlawful use of public money by disbursing officers.

Revised Statutes, section 5490 above referred to (Criminal Code, section 80) relates to the unlawful use of public moneys by custodians.

Revised Statutes, section 5492 above referred to (Criminal Code, section 91) relates to the failure of a person, having money of the United States in his possession or under his control, to deposit it as required by law.

The following provisions of Army Regulations No. 210-65 are here quoted for the convenience of the court:

> "77a. LIABILITY OF POST EXCHANGE TO FEDERAL TAXES.
>
> Post Exchanges are not liable to the income tax imposed by section 10, war revenue act of October 3, 1917 (40 Stats. 300, 333). While they are, in a sense, associations of military organizations for business purposes, they are nevertheless government agencies or instrumentalities expressly recognized by Congress in the annual

Army appropriation acts, and they are designed to carry out a government purpose. It has never been the policy of the government to tax its own enterprises or its own manner or method of doing business. (*Dugan* vs. *United States*, 34 Ct. Cls. 458.) For the same reason neither post exchanges nor officers in charge thereof are liable for the payment of the internal revenue tax for the sale of tobacco imposed by the act of October 22, 1914 (34 Stat. 745, 752). Post exchanges are, however, subject to the stamp tax imposed by said internal revenue act (38 Stat. 763) and accordingly they are not permitted to sell articles of merchandise on which special tax stamps are required until such stamps have been affixed. A post exchange is also subject to the freight tax imposed by sections 500, 501, of the war revenue act of October 3, 1917 (40 Stat. 300, 314), since transportation service rendered to a post exchange is not service rendered to the United States within the exception contained in section 502 of said act." Ops. J. A. G., April 9, 1918.

"FLOOR TAX ON TOBACCO.

77c. Government agencies, such as post exchanges, are required to pay floor tax on tobacco under section 702 of the revenue act of February 24, 1919 (Pub. No. 254, Sixty-fifth Congress, p. 68). (See Dig. Ops. J. A. G., 1917, p. 459.) Ops. J. A. G. February 28, 1919."

"77d. INTERNAL REVENUE ON SOFT DRINKS SOLD AT GOVERNMENT AGENCIES. As the Treasury Department has ruled in a decision dated July 24, 1919, T. D. 7, I. R. 2893, p. 31, the sales of ice cream and soft

drinks sold by a municipality, post exchange, the Red Cross, or similar institutions are subject to the tax imposed by the act of February 24, 1919, 40 Stat. 1057, 1116, as the tax falls directly upon the purchaser; and this is not necessarily in conflict with the opinion of this office. Ops. J. A. G., April, 1919, p. 181. Since the Treasury Department is charged with the administration of the law its rulings should prevail until reversed by proper authority. Ops. J. A. G., Aug. 23, 1919."

"77f. STATE TAXES. Generally the exacting from the Federal Government of a State tax imposed on purchaser even if delivery takes place within the State; as distinguished from delivery on a reservation exclusively under Federal jurisdiction, is illegal, as infringing the right of the United States to exemption of its property and instrumentalities from all State taxation. (See 1 Comp. Gen. 229.) No such condition arises, however, where a State law imposes a tax on the dealer and such tax is included in the purchase price which the Government pays. (See 1 Comp. Gen. 584; 3 *ibid.* 781; 4 *ibid.* 1041; 5 *ibid.* 1022.) A post exchange is not legally liable for local or municipal taxes or licenses on the sale of commodities for the exclusive use of persons in the military service, as such exchange is an instrumentality of the Government of the United States. Ops. J. A. G., Nov. 21, 1899."

"81c. LIABILITY TO CIVIL SUIT ON CONTRACT. * * * A post exchange is a voluntary unincorpoated cooperative association of Army organizations, a kind of cooperative store,

in which all share in the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by the proper officers of a post exchange should be tested by the same rules of obligation which govern like agreements of individuals. In the event of an inability on the part of a post exchange to pay its debts, the organizations which participate in the Post Exchange should themselves pay off all such obligations in proportion to their respective interest in the exchange. (Ops. J. A. G., June 4, 1918.) * * * The officers of a post at which a Post Exchange is located are not liable for its debts. (Ops. J. A. G., January 7, 1911.) * * * Where a post exchange officer was required over his protest to pay out of his private funds for certain supplies ordered, furnished, and used by the Post Exchange, * * * and the exchange was dissolved, * * * recommended that the post exchange officer be reimbursed * * * by the several organizations comprising the exchange at the time the indebtedness was incurred. Ops. J. A. G., March 6, 1911; October 3, 1911."

"81f. REIMBURSEMENT FOR LOSS WHILE ATTEMPTING TO SAVE PROPERTY. As property of the regimental or Post Exchange can not be treated as property belonging to the United States, an enlisted man whose property was destroyed while he was giving attention to saving property of the exchange is not entitled to reimbursement. 25 Comp. Dec. 960."

Attention is directed to the statement contained

in paragraph 77 that Post Exchanges "are, in a sense, associations of military organizations for business purposes," and a further statement that such exchanges are subject to the stamp tax imposed by the Internal Revenue Act (38 Stats. 763), and are also subject to the freight tax imposed by sections 500 and 501, of the War Revenue Act of October 3, 1917 (40 Stats. 300, 314), since transportation service rendered to a post exchange *is not* service rendered to the United States within the exception contained in section 502 of said act. Citing Ops. J. A. G., April 9, 1918.

If a Post Exchange was a department of the Federal Government the transportation service rendered to it would be service rendered to the United States. The ruling of the Judge Advocate General that such service is not service rendered to the United States necessarily carries with it the conclusion that a Post Exchange is not a department of the Federal Government.

The tax here in question is not on the product sold but is a privilege tax imposed upon the dealer, and the tax is included in the purchase price which the Post Exchange pays. See 77f above the citations.

Surely, if the Federal Government itself imposes upon Post Exchanges internal revenue taxes, such as the stamp tax, floor tax on tobacco, tax on soft drinks and ice cream, as well as the feight tax, the government is in no position to say that a State

may not impose a franchise or privilege tax on a dealer in a certain commodity merely because that commodity is sold to a Post Exchange. Such a contention would be entirely inconsistent with the Government's own attitude toward Post Exchanges.

The case of *Panhandle Oil Co. vs. Mississippi, supra*, does not support appellant's contention here for the reason that in that case the sale was to the Coast Guard Fleet, which admittedly comes under the designation of a "Department of the Government."

Aside from *McCulloch* vs. *Maryland*, 4 Wheat 316, and *Panhandle Oil Co.* vs. *Mississippi, supra*, appellant has cited no cases in support of its contention, and since it is apparent that neither of these cases is in point we think it has been demonstrated that a Post Exchange is not a department of the Federal Government, and that a sale to it is not for the official use of the Government, and that, therefore, the distributor is not exempt from the tax by reason of such sale.

Although the following cases are not precisely in point, since they involved Federal and State income tax laws, nevertheless, they have a bearing here upon the question of interference with or imposition upon Federal instrumentality by reason of State taxing laws:

Flint vs. *Stone Tracy Co.*, 220 U. S. 107;
Willcuts vs. *Bunn*, 282 U. S. 216;
Educational Films Corp. vs. *Ward*, 282 U. S.; 379;

Denman vs. *Clayton*, 282 U. S. 514;
Metcalf & Eddy vs. *Mitchell*, 269 U. S. 514.

Likewise, the following cases, involving a different kind of tax:

Cornell vs. *Coyne*, 192 U. S. 418;
Lash's Products Co. vs. *U. S.*, 278 U. S. 175;
Wheeler Lumber Co. vs. *U. S.*, 281 U. S. 572;
Indian Motorcycle Co. vs. *U. S.*, 51 Sup. Ct. Rep. 601.

Let it here be noted that in the *Panhandle Oil* case Justices Holmes, Brandeis, Stone and McReynolds dissented, and in our opinion the grounds of dissent show that the majority opinion departed from principles long before established by decisions of this court and still adhered to, in spite of the *Panhandle* case. Note the words of Mr. Justice Stone in his dissenting opinion in the *Motorcycle* case:

> "These considerations are, to me, persuasive that the broad rule announced in the Panhandle Oil case ought not to be extended, *even if we were not required by our own decisions to limit it;* and that we ought not to strain the words of the statute to bring this case within the authority of that one." (Italics ours.)

Again we find that in the *Motorcycle* case Justices Stone and Brandeis dissented and Mr. Justice Holmes acquiesced in the decision only upon the ground that the *Panhandle Oil* case (in which he had dissented) was controlling. In other words,

he also dissented in the *Motorcycle* case. The dissenting opinion of Mr. Justice Stone in the *Motorcycle* case is most instructive and illuminating, particularly as to the extent to which the *Panhandle Oil* case has already been modified or limited.

He points out that the court has never attempted to state the reason for the distinction made between the *Panhandle* case and cases involving a tax on legacies to the United States or to a State (*U. S.* vs. *Perkins*, 163 U. S. 625; *Snyder* vs. *Bethman*, 190 U. S. 249; *Greiner* vs. *Lewellyn*, 258 U. S. 384), although the consequent indirect burden is apparent, and he also points to the *Educational Films Company* case and that of *Willcuts* vs. *Bunn* to show the court's more recent opinion that an excise tax, imposed directly on the individual, is *not* invalid because indirectly it may burden either the State or the National Government.

We believe the *Panhandle* case is not in point here for the reasons already stated herein, and for the further reason that under our statutes, where the motor fuel is not used in motor cars on the highways of the State, the tax paid may be recovered by the consumer. Another distinction is that the United States is empowered by the Constitution to maintain and operate the Coast Guard Fleet and the Veterans' Hospital, and the right of the United States to make purchases therefor is derived from the Constitution (*Panhandle Oil* case), while Post Exchanges are merely instru-

mentalities established under army regulations which have received the approval of the Congress.

The *Panhandle Oil* case can not be considered as authority here for the further reason that in that case no question of resale of the gasoline was involved. For all that appears from the record the gasoline purchased by the Government for the use of the Coast Guard Fleet and the Veterans' Hospital was used by those departments of the Government, and such use constituted "official use" by "departments of the Federal Government." Even if we assumed in this case that the Post Exchange was a "department of the Federal Government" and that it used some of the gasoline purchased by it "for official use," and could therefore obtain a refund of the tax paid thereon, it does not follow that gasoline *resold* by it and thereafter *used on the public highways of the State* is either exempt from the tax, or that the purchasers of the same would be entitled to a refund of the amount representing the tax. The contrary is obviously the case. Since the *Panhandle Oil* case involved no such resale, or in fact any resale at all, it is clearly not in point here. The same reasoning further distinguishes the *Indian Motorcycle* case, for there also there was no resale by the municipality, but a use by it for its own Governmental purposes.

There is a still further distinction to be drawn here to which reference has not hitherto been made.

It must be conceded that the Government of the United States, in supervising and controlling, in a sense, the activities of Post Exchanges, does not become responsible, financially or otherwise, for such exchanges. In reality, these exchanges are private enterprises sanctioned by the Government and operated under its supervision, the profits being distributed to the component units, and the losses, if any, being shared by them, and to this extent the Government is engaging in a private enterprise, and not in its ordinary function as a Government.

That being so, the situation is analagous to that in the case of

South Carolina vs. *United States*, 199 U. S. 437.

South Carolina prohibited the sale of liquor and established dispensaries operated by persons who had no pecuniary interest therein. Sections 3232 and 3244 of the U. S. Revised Statutes provided that no person should engage in the business of selling distilled spirits without paying a special tax therefor.

The United States demanded this special tax from each dispenser and the tax was paid by the State under protest and suit was brought to recover the amount so paid.

Among other things, it was held by the Supreme Court that a State may control the sale of liquor by the dispensary system, but when it does so, it engages in ordinary private business, which is not, by the mere fact that it is being conducted by the

State, exempted from the operation of the taxing power of the National Government. Under many authorities, some of which are cited herein, the converse of the foregoing is equally well established: We think that although the Government derives no pecuniary profit from the operation of Post Exchanges, nevertheless, it has a sort of paternal interest therein and to the extent that the personnel employed by the Government profit thereby, the Government also profits. So we believe the Government can not avoid the necessary result of its activities in this respect, nor can it hide behind the contention that in engaging in such activities it is engaging in the ordinary functions of the Government of the United States.

Consider for a moment to what extent the Government might go if its present contention be sustained:

The regulations, as previously pointed out, limit sales at Post Exchanges to certain designated persons or classes, including civilian employees. As to all of them it is claimed the tax in question is not payable. Upon that theory the regulations might be changed to embrace other persons and classes, including, so far as we can see, any person in the State of California. What would be the result? No gasoline would be sold except in Post Exchanges; no revenue would accrue to the State; no funds would be provided for construction of new highways or bridges, or for the maintenance or repair of those

now in existence; commerce over the highways, both interstate and intrastate, would be free and traffic would be uncontrolled; confusion would soon become chaos; accidents attended by injuries and death would multiply, and eventually by the terrific strain on the highways they would become impaired, dangerous and finally impassable.

We concede readily that the foregoing is an extreme example not to be considered as at all probable. But to say that it is not probable is to admit that it is possible. An inch once conceded will, in time, be stretched to a foot, and so on. The United States Government is jealous of its taxing powers and of its revenues derived therefrom, and it behooves the State to be no less jealous of its prerogatives, especially where the benefits derived from a particular tax are seen to extend equally to all who wish to avail themselves of such benefits. It has not been pointed out in any of the briefs filed on behalf of appellant why a comparatively large number of persons should enjoy the use and benefits of California's highways without contributing alike with other residents of the State to their construction, maintenance, repair and regulation through traffic control.

The road signs, the traffic lanes of white and yellow lines, the motorcycle officers, all contribute to the safety and comfort of the passenger in motor vehicles, and enable him to pass rapidly from place to place within the State and to points beyond its

borders, and the cost thereof, while considerable, is of no comparison with the cost of constructing, maintaining and repairing these avenues of travel. As we have pointed out, the State provides these facilities from the revenues arising from this tax and does not otherwise profit thereby, and it can not be said that the Government of the State is engaged in any sense in a private enterprise.

Assuming for the sake of argument that a Post Exchange is an instrumentality of the Government which *may be* protected from State taxation, it is not so protected unless Congress has so provided. This is so even though the tax had been levied directly against the instrumentality, and not, as here, levied upon the distributor of a commodity sold to the exchange

(a) *Shaw* vs. *Gibson Zahniser Oil Corp.*, 276 U. S. 575;

(b) *Gondy* vs. *Meath*, 203 U. S. 146;

(c) *Cromer* vs. *Standard Dredging Co.*, 224 U. S. 362;

(d) *Fidelity & Deposit Co.* vs. *Philadelphia*, 240 U. S. 319;

(e) *Railroad Co.* vs. *Peniston*, 18 Wall. 5;

(f) *Choctaw O. & G. R. R. Co.* vs. *Mackey*, 256 U. S. 531;

(g) *Central Pacific R. R. Co.* vs. *California*, 162 U. S. 91.

In (a) above, a State tax was imposed on those engaged in the production of oil and gas equal to

three per cent of the gross value less the royalty interest. The land had been purchased by a full blood Indian with trust funds, under the supervision of the Secretary of the Interior. The land was leased to the oil company and it objected to the gross production tax on the ground that it constituted a tax on a Federal instrumentality.

The court held the tax was valid, although it said that

> "* * * in a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the State in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. * * * There are some instrumentalities which, though Congress may protect them from State taxation, will nevertheless be subject to that taxation unless Congress speaks." (Citing the cases above mentioned.)

In (b) above, the question was whether lands belonging to a Puyallup Indian, acquired by him under a treaty of March 16, 1854 (10 Stats. 1043) were subjected to State taxation.

It was held that no exemption of such land existed by implication, but that exemption must be clearly manifested. Since no exemption was to be found in any act of Congress it was held that the lands were subject to State taxation.

In (c) above the question was whether property

of a Delaware corporation situated in the harbor of San Juan, Porto Rico, and used exclusively in dredging operations pursuant to contract with the United States, was subject to the taxing power of Porto Rico. The court held that it was and that the contention that the property was an instrument of the National Government and therefore not subject to local taxation could not prevail.

In (d) above the *tax* was a State tax imposed upon premiums received by a surety company upon surety bonds required by the United States. It was claimed that such an exaction burdened the operations of the Federal Government and that the surety company was a Federal instrumentality and could not be subjected to such a privilege tax.

It was held that the company's right to do business in the State depended upon compliance with its laws and that mere contracts between private corporations and the United States do not necessarily render the former essential Government agencies and confer freedom from State control. The tax was upheld.

(e) above is quoted from in (g) *infra*.

In (f) above it was held that a railroad right of way and station grounds constituting, with the consent of Congress, parts of a through line of an extensive interstate system, are not exempt from State special tax assessments upon the ground that they are parts of a Federal instrumentality, though originally granted by Congress with a purpose to

develop coal lands of the Choctaw Nation, and though coal mines leased from the tribe are served by the railroad.

In the course of its opinion the court said:

> "The mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from State taxation. * * * And even though it be granted that the Federal Government utilized the railroad as an instrument in working out its policy toward the Indians the tax upon the railroad property would be none the less valid." (Citing cases.)

In (g) above, it was held, following *Railroad Co.* vs. *Peniston*, 18 Wall. 5, that even in respect of railway corporations created by act of Congress, the claim of exemption of their property from State taxation has been repeatedly denied.

Quoting from

Railroad Co. vs. *Peniston, supra,*

the court said:

> "It can not be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the State all power to tax persons or property. * * * It is therefore manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, *or upon the fact that they are agents* (italics ours), but

upon the effect of the tax, that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers. * * * No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It can not be so used, indeed, as to defeat or hinder the operations of the National Government, but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

See, also,

Pullman Co. vs. *Richardson,* 185 Cal. 484; affirmed, 261 U. S. 330;
A. T. & S. F. R. Co. vs. *Collins,* 294 Fed. 742;
Payne vs. *Richardson,* 189 Cal. 103.

Although the foregoing cases are in point here, they are not so important as the case of

Keane vs. *United States,* 272 Fed. 577.

In that case the exact point here under consideration was decided by the Circuit Court of Appeals,

Fourth Circuit, State of Virginia, on February 2, 1921.

The question was whether a military Post Exchange was such a "department of the Government" that proof of a conspiracy to defraud it would sustain an indictment under Criminal Code, section 37 (Comp. Stats., Sec. 10201), which reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The court considered the manner or method of establishing Post Exchanges and then said:

> "In this connection it may be mentioned that these Post Exchanges are such purely private organizations for the convenience and pleasure of the soldiers themselves that they have been required to pay floor taxes on tobacco under section 702 of the Revenue Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, Par. 6204*d*). The Judge Advocate General's Office, a branch of the War Department, held that these exchanges were subject to floor taxes on tobacco. See Opinions of the Judge Advocate General, 3313, February 28, 1919. We find in the opinion of the Judge Advocate General, No. 158, Janu-

ary 4, 1918, the following illuminating, yet brief, definition of a Post Exchange, to wit:

"'A Post Exchange is a voluntary, unincorporated cooperative association of army organizations a kind of cooperative store in which all share the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by the proper officers of a Post Exchange should be tested by the same rules of obligation which govern like agreements of individuals. In the event of an inability on the part of a Post Exchange to pay its debts, the organizations which participate in the Post Exchange should themselves pay off all such obligations in proportion to their respective interests in the exchange.'" (Pages 581 2.)

"The question here is not whether a Post Exchange is useful and pleasurable to soldiers, and therefore to the army, but the question we must decide is whether or not a Post Exchange is such a lawful department of the Government as to bring it within the protection of section 37 of the Criminal Code. If the transaction alleged in the indictment in this case is covered by this section of the Criminal Code, then every transaction with a purchaser, representing a Post Exchange, of baseballs and baseball supplies, of cricket clubs, of golf balls and sticks, and even of playing cards, would be, in case of conspiracy to defraud such organization, subject to the pains and penalties of this drastic criminal section." (Page 583.)

"It is not every organization authorized to be formed by Congress that is such a lawful department of the government within the contempla-

tion of this criminal statute. If the contrary were true, then it would be a criminal offense to conspire to defraud every corporation or organization authorized to be established by Congress. This would include dealing with the Young Men's Christian Association, the American Red Cross, the National Educational Association, the American Boy Scouts, and numbers of other organizations which have been authorized and incorporated by Congress. Congress, by the act of May 31, 1902 (Comp. St., Par. 1989), expressly gave the Secretary of War power to grant permission to the International Committee of the Young Men's Christian Association of North America to erect and maintain in the military reservations within the United States on its foreign possessions such buildings as their work for the promotion of the social, physical, intellectual, and moral welfare of the garrison may require under such regulations as the Secretary of War may impose. Here is a direct warrant from Congress for the operation of these Christian Associations, and tacit inference that they are necessary for the physical, intellectual, and moral welfare of the soldiers; and yet it will not be argued that this organization is such a 'lawful department' of government, subjecting persons who deal with its representatives to the pains and penalties of section 37 of the Criminal Code." (Page 587.)

"Clearly the post exchange described in the indictment in this case is not such a lawful department of government. Therefore this Post Exchange is not such an institution as that a fraud upon the United States can arise from or

be involved in any transaction concerning it, and section 37 of the Criminal Code does not apply to transactions with such organization." (Pages 587 8.)

It is apparent that the Government acquiesced in the decision in the *Keane* case for we find nothing to indicate an appeal therefrom.

The decision of the court is so obviously sound that it is not surprising that the Government accepted it.

In the case of

Thirty-first Infantry Post Exchange vs. *Juan Posadas, Jr.*, 54 Philippine Reports, 866,

decided on September 4, 1930 (petition for writ of *certiorari* denied by U. S. Supreme Court on April 20, 1931), the question involved was whether the Philippine Government could impose a sales tax on merchants selling goods to an Army Post Exchange.

The Supreme Court of the Philippine Islands, in a well-considered opinion, held:

1. That "whenever the National Government permits an organization under its control to engage in a business which is of a private nature, that business is not withdrawn from the taxing power of the State. *South Carolina* vs. *U. S.* (1905), 199 U. S. 437."

2. That "only those agencies through which the Federal Government immediately and directly ex-

cretion its sovereign powers are immune from the taxing power of the States. * * * The effect of the tax upon the functions of the Government and the nature of the governmental agency determine finally the extent of the exemption." *Metcalf* vs. *Mitchell* (1926), 269 U. S. 514; *Thomson* vs. *Union Pac. Ry. Co.* (1869), 9 Wall. 595."

3. That the case of *Panhandle Oil Co.* vs. *Mississippi*, 277 U. S. 218, is not controlling. "There the right of the United States to make purchases was derived from the United States Constitution; here, the right of the Army Post Exchange to make purchases is derived from Army regulations and Army practice. There the sale was made to instrumentalities authorized by the Constitution, which consumed the merchandise; here, the sales were made to Army Post Exchanges not so constitutionally authorized, which merely acted as intermediaries. There it must be taken for granted that the Coast Guard Fleet and the Veterans' Hospital were constructed and operated by Government funds; here, except that buildings are provided by the United States Government for the Army Post Exchanges, the latter are not so constituted and operated."

4. That "the majority decision in the *Panhandle Oil* case carries the Marshallian theory of national supremacy just about to its extreme limits. We do not think that the present case falls within those limits. When a merchant sells a case of hair pins

to an Army Post Exchange, and the wife of an army officer purchases a package of those hair pins, and when a merchant sells a quantity of tobacco to an Army Post Exchange, and a soldier provides himself with his tobacco; and when the merchants who perfect the sales made good the required taxes, 'the exertion of national power' is not so burdened or interfered with, and 'the exactions demanded' do not so infringe the constitutional independence of the United States as to exempt the sales from taxation, which every one else, including the merchant who sells to the Philippine Government, must pay. That is our understanding of the authorities of the law.

"There can exist no measure of doubt that the basic rule, together with its qualifications, applies not only to the States of the American Union, but also to unincorporated territories with the status of the Government of the Philippine Islands.

"Placing some emphasis on the point of long acquiescence in the imposition of the sales tax on vendors of merchandise to Army Post Exchanges; on the point that the Congress of the United States has virtually sanctioned such a sales tax by confirming Philippine revenue laws without reservation; and on the point that a kind of cooperative store in the Army is akin to a private business enterprise which is not withdrawn from taxation, we desire with more emphasis to indicate the lack of standing of the plaintiffs to contest the tax. On

still broader grounds, we would consider the effects of the sales tax upon the United States Army, and the nature of an Army Post Exchange. The tax laid upon Philippine merchants who sell to Army Post Exchanges does not interfere with the supremacy of the United States Government, or with the operations of its instrumentality, the United States Army, to such an extent or in such a manner as to render the tax illegal. The tax does not deprive the Army of the power to serve the Government as it was intended to serve it, or hinder the efficient exercise of its power.

"We rule that an Army Post Exchange, although an agency within the United States Army, can not secure exemption from taxation for merchants who make sales to the Post Exchange. The question must, therefore, be answered in the affirmative. The plaintiffs have not made out a case."

As stated above, application was made to the Supreme Court of the United States for a writ of *certiorari* and the writ was denied on April 20, 1931. (51 Sup. Ct. Rep. 487.)

The most recent decision on this point is found in the case of *Pan American Petroleum Corporation* vs. *State of Alabama*, ____ Fed. (2d) ____, decided by the United States Circuit Court of Appeals for the Fifth Circuit, on November 15, 1933.

The statement of the issues involved is quoted from the opinion of the court as follows:

"This is a suit by the State of Alabama to collect excise taxes upon the sales of gasoline and other petroleum products by the Pan American Petroleum Corporation to post exchanges at Camp McClellan and Maxwell Field, located in Alabama but situated on United States Government reservations. These petroleum products were shipped into Alabama from other States, stored by the Pan American in bulk plants at Anniston and Montgomery, Alabama, and afterwards sold therefrom by it and delivered to the post exchanges. We need consider only the tax in respect of sales of gasoline, for it is admitted that if it is collectible, the tax on sales of the other petroleum products is likewise collectible. The suit was defended upon the grounds, among others, (1) that the tax did not accrue because the gasoline was sold for use at post exchanges on military reservations, the idea being that they are not in the State of Alabama; and (2) that a post exchange is a department of the United States Government, and therefore sales made to it are exempt from the tax. Other grounds of objection to the tax were also urged, but in the view we take of the case it is unnecessary to consider them. The case was tried upon an agreed statement of facts before the district judge, who gave judgment for the State; and the defendant appeals."

Inasmuch as the Alabama statute provided for the imposition of the tax "upon selling, distributing or *withdrawing from storage* for any use gasoline as herein defined in this State," the court held that it was unnecessary to decide whether the situs of a

military reservation after cession to the United States is inside or outside the State.

But upon the question whether a Post Exchange is a department or instrumentality of the Federal Government the court said:

> "It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to the United States, either directly, or indirectly through one of its departments, for Government use. *Panhandle Oil Co.* vs. *Mississippi*, 277 U. S. 218. There a sale of gasoline was made direct to the United States for the use of the Coast Guard and a Government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the Government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline. Furthermore a Post Exchange is of course not the Government; nor is it a department or instrumentality thereof. On the contrary, a Post Exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The Government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the Post Exchanges at Camp McClellan

and Maxwell Field are not exempt from the State excise taxes."

The Supreme Court of California, in disposing of this point, said:

"But it seems to us that a well founded distinction may be found between the sales there involved (Panhandle Oil case) and sales to an army Post Exchange. The commanding officer of an army post is not required to organize the Post Exchange unless there is need for it unless the units present desire to participate therein or unless the personnel is sufficient to profitably maintain and support such an institution. In other words, a Post Exchange is at most but a Government agency, designed to operate for the welfare of the troops such activities as a general store, meat or vegetable market or gasoline station, or a restaurant, gymnasium, recreation room, library or theater. Thus it is not properly described by the word 'department' of the Government in its activities. It is largely a cooperative institution, intended to supply the needs and promote the moral and civic betterment of the troops at the post.

"It is supervised by an exchange council, composed of the commanding officers of the respective units represented in the organization. The funds of the Exchange are not public moneys within the meaning of the Revised Statutes (Rev. Stats., Sec. 5488, 90, 92). The Exchange

is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. It is a voluntary, unincorporated, co-operative association in which all units share the benefits and all assume a position analogous to that of partners. In the event of the inability of the Post Exchange to pay its debts, the organizations which participate in it are supposed themselves to pay off all such obligations in proportion to their respective interests in the Exchange. Neither the Government nor the officers of the post wherein the Exchange is located are liable for its debts. The property of the Post Exchange is not to be treated as property belonging to the United States. The Exchange itself is liable for certain Federal taxes, such as the stamp tax imposed by the Internal Revenue Act, the freight tax imposed by the War Revenue Act of 1917, a floor tax on tobacco under the Revenue Act of 1919, Sec. 702; sales of ice cream and soft drinks by a Post Exchange are subject to tax under the same act. From these and other observations that might be made, touching the nature of the organization of an army Post Exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the State wherein it is located and that it is not one of those agencies through which the Federal Government exercises its constitutional or sovereign power."

We find, therefore, that in respect to appellant's third contention, the decision in every case wherein

that contention was involved has been against appellant.

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These cases are:

Keane vs. *United States*, 272 Fed. 577;

Thirty first Infantry Post Exchange vs. *Posadas*, 54 Philippine Reports, 866;

People vs. *Standard Oil Co.*, 85 Cal. Dec. 550, 22 Pac. (2d) 2;

Pan American Petroleum Corporation vs. *State of Alabama*, Fed. (2d)

The importance to the State of California of a decision of this court upholding the validity of the tax in question is not indicated by the amount involved here. However, the court may well infer the fact to be, as indeed it is, that large revenues of the State are involved, as is true in other States which are anxiously awaiting the outcome of this case. Not only that, but there is a principle involved, a matter of State sovereignty, which is of vital importance.

In the very recent case of

Gregg Dyeing Co. vs. *Query*, 52 Sup. Ct. Rep. 631; decided May 31, 1932,

this court has definitely stated that in maintaining rights asserted under the Federal Constitution the decision of the court is not dependent upon the form of a taxing scheme or upon the characterization of it by a State court; that the court regards the

substance rather than the form, and that the controlling test is found in the operation and effect of the statute as applied and enforced by the State.

The State court in that case had held that the burden of the tax in question actually rested upon the consumer although not directly placed upon him, and this court said that it found no reason to challenge that view.

In the case of our statute, the Supreme Court of California held in

People vs. *Ventura Refining Co.*, 204 Cal. 286,

that the clear intent of the law was to levy an excise or occupation tax upon the distributor, but permitting the distributor to indemnify itself by adding the amount of the tax to the selling price so that the ultimate effect of the tax falls upon the consumer who indirectly pays it.

That this court will adopt and follow this construction of our statute is apparently made clear and certain by what was said in the *Gregg Dyeing Company* case.

Judging by the decision in that case it seems clear that this court in the case at bar will consider the operation and effect of the Statute and will hold that the effect is to impose the tax upon the ultimate consumer of gasoline and not upon the United States or any of its departments, agencies or instrumentalities, and will further hold that the imposition of the tax under the facts of this case does not interfere with the exclusive jurisdiction of the

United States over the Presidio of San Francisco or burden the Government in any manner or form whatsoever, but that the tax is, in effect, a just and reasonable charge for the use of State highways and other facilities furnished to the motoring public by the State, and that as such the tax in question is valid and the statute imposing it is free from constitutional or other objections.

We submit, therefore, that the judgment of the Supreme Court of California herein appealed from should be affirmed.

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